Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MARY L. HELMS, *et al.*,

Petitioners,

v.

CECIL J. PICARD, *et al.*,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF OF RESPONDENT SPECIAL EDUCATION SERVICES CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BY MARY L. HELMS, ET AL.

Thomas A. Rayer
Counsel of Record
Richard Bordelon
DENECHAUD & DENECHAUD
210 Baronne Street, Suite 1207
New Orleans, Louisiana 70112
(504) 522-4756

Attorneys for Respondent

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QUESTION PRESENTED

Whether the court of appeals correctly applied *Agostini v. Felton*, 521 U.S. 203 (1997) to the specific facts of this case.

STATEMENT PURSUANT TO RULE 29.6

There are no parent or subsidiary companies to be listed under the provisions of Rule 29.6.

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BRIEF OF RESPONDENT SPECIAL EDUCATION SERVICES CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners seek review of that portion of the judgment in *Helms v. Picard*, 151 F.3d 347 (5th Cir. 1998), which rejected an as-applied Establishment Clause challenge to a narrow portion of the special education program operated by the Jefferson Parish Public School System ("JPPSS"). In accordance with State law, the JPPSS offers free appropriate special education services to all eligible children who reside within the school district. Petitioners challenge only that portion of the program under which, at the time of trial in 1990, twelve public school employees served as special education teachers in dedicated classrooms located on the premises of eight religiously-affiliated schools in Jefferson Parish.

Respondent Special Education Services Corporation ("SESC") was established as a Louisiana nonprofit corporation in 1981 and was organized for the purpose of "assisting students who are having academic and behavior problems." Appendix to Petition for Writ of Certiorari ("Pet. App.") 117a. For the 1989-1990 school year, the last year prior to trial in this case, the Jefferson Parish School Board contracted with respondent concerning the operation of the special education program as it related to students attending nonpublic schools. Pet. App. 305a. It is the operation of this contract in eight schools in Jefferson Parish in 1990 that is challenged in the petition.

Respondent opposes the petition because it fails to satisfy any of the criteria justifying a grant of the writ. Petitioners do not even attempt to suggest that there is a conflict in the circuits on the issues presented in their petition. *See* Sup. Ct. R. 10(a). Nor do they suggest that the Fifth Circuit engaged in an extraordinary departure from normal judicial procedure. *Id.* It cannot seriously be

contended that the small portion of the unique JPPSS program challenged here – which applies Louisiana special education law to permit the activities of twelve teachers on the premises of eight schools – involves an important federal question of broad applicability. Sup. Ct. R. 10(c). And the suggestion that the Fifth Circuit's holding conflicts with this Court's decisions in *Larkin v. Grendel's Den*, 459 U.S. 116 (1982) and *Bd. of Educ. v. Grumet*, 512 U.S. 687 (1994), is frivolous: unlike in those cases, final substantive decision-making authority here rests in all instances with *public* authorities, not religious authorities. *Compare* Pet. App. 305a (teachers are public employees), 308a (teachers are overseen by public school authorities), *infra* p. 9 (public school authorities retain and exercise decision making authority) *with Larkin*, 459 U.S. at 117 (final authority over grant or denial of liquor license application rested with religious organization) *and Grumet*, 512 U.S. at 698 (final authority rested with group expressly selected according to religious criteria).

This is, rather, precisely the kind of petition that is "rarely granted": one involving the alleged "misapplication of a properly stated rule of law." Sup. Ct. R. 10. Petitioners concede that the court of appeals correctly held that this Court's decision in *Agostini v. Felton*, 521 U.S. 203 (1997), supplies the applicable rule of law. *See* Petition for Writ of Certiorari ("Pet.") at 17, 20-21, 29-30. They do not identify any way in which the court of appeals misstated the holding in *Agostini*. Rather, petitioners candidly admit that their complaint is that the decision below improperly "extends *Agostini*" to the marginally different factual situation presented by the small JPPSS on-premises special education program. Pet. at 21.

Petitioners are wrong. The court of appeals carefully and correctly applied *Agostini* in upholding the JPPSS program. Respondent SESC agrees with, and adopts by reference, the analysis in the brief in opposition to certiorari

filed by respondents Guy Mitchell, *et al.*[1] That brief demonstrates that the minor factual differences between the special education program and the on-premises Title I program upheld in *Agostini* are not of constitutional significance and do not dictate an outcome different from that in *Agostini* here.

Respondent SESC submits this separate opposition to address an additional flaw in the petition for certiorari that constitutes additional grounds for denying the writ. Petitioners' purported factual distinctions between *Agostini* and the JPPSS program virtually ignore the detailed findings of fact of the district court, which petitioners have never challenged as clearly erroneous, and upon which the court of appeals properly relied. Instead, petitioners seek to recharacterize the facts by cobbling together carefully selected record excerpts.

Respondent submits this brief opposition to remedy this inaccurate characterization of the JPPSS special education program as operated in 1990. As we explain below, the unchallenged factual findings in this case conclusively demonstrate that the special education program is a religiously neutral benefit program staffed and run by public school employees that provides purely secular educational benefits to students without regard to their religious affiliation. There is no constitutional issue here.

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[1] Respondents also agree with, and hereby adopt by reference, the counterstatement of the case contained in the brief of respondents Guy Mitchell, *et al.*

REASONS FOR DENYING THE WRIT

THE SPECIAL EDUCATION PROGRAM IS RELIGIOUSLY NEUTRAL, IS STAFFED AND RUN BY PUBLIC SCHOOL EMPLOYEES, AND PROVIDES PURELY SECULAR EDUCATIONAL BENEFITS TO STUDENTS WITHOUT REGARD TO THEIR RELIGIOUS AFFILIATION

A. The Program Does Not Define Its Beneficiaries By Reference To Religion.

The on-premises services challenged by petitioners are one small part of the overall JPPSS special education program designed to fulfill the school district's duty to provide "an appropriate, free, publicly supported education to every exceptional child who is a resident [of the district]." La. Rev. Stat. Ann. § 17:1941 (West Supp. 1998). *See also* Pet. App. 6a. State funds for special education programs are allocated to the JPPSS "'based on the number of exceptional children served by employees of the local school board, consistent with state-required pupil/teachers ratios for the provision of services to students with particular exceptionalities.'" Pet. App. 7a quoting *Helms v. Cody*, 856 F. Supp. 1102, 1110 (E.D. La. 1994) (Pet. App. 123a). In 1989-90, the JPPSS employed approximately 740 special education teachers to serve over 5,800 handicapped students. Pretrial Order, Stipulated Fact 35. Only twelve of those teachers were assigned to religiously-affiliated schools. *Id.* at 39.

The portion of the special education program challenged by petitioners involves the last remnants of JPPSS special education services provided on-premises to children enrolled in nonpublic schools. As the district court found, the JPPSS first assigned special education teachers to instruct special education students in nonpublic schools in 1975-76. Pet. App. 118a. The JPPSS provided special

education services on-premises because of "the lack of classroom space in the public school system." Pet. App. 119a. Later, in 1982 the JPPSS determined to limit and ultimately to reduce the services provided to nonpublic school students on the premises of their schools. Pet. App. 119a-121a.

The modifications to the program in effect at the time of trial had reduced and limited services to nonpublic school students in the following respects:

- The JPPSS applied the same teacher-student ratio used in allocating special education teachers for public school students to determine which nonpublic schools had sufficient concentrations of special education students to justify the placement of a special education teacher there. Doc. 254, Adams 4/5/90 Testimony ("Test.") 100, 102, 105, 120; Adams 4/6/90 Test. 26-27.[2] JPPSS special education teachers were assigned only at schools meeting the uniformly applied special education teacher-student ratio. *Id.*

- After the initial assignment, the number of JPPSS special education teachers assigned to teach at nonpublic schools was further reduced by a policy barring the assignment of additional special education teachers to teach students in nonpublic schools. Pet. App. 136a. The number of special education teachers teaching on the premises of nonpublic schools has been reduced by attrition. *Id.*

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[2] Citations to "Doc." refer to the document number on the district court's docket sheet; citations to "Test." refer to trial testimony by the named person at the page and date indicated.

- Although the JPPSS pays a "local portion" of the salary of JPPSS special education teachers working in public schools (who receive the bulk of their salary from State-allocated funds), the JPPSS no longer pays the "local portion" of salaries of teachers working in nonpublic schools. Instead, the "local portion" is paid by tuition surcharges paid by parents of nonpublic school children receiving special education services on-premises. Pet. App. 9a. No public funds are disbursed to any public or private school, or to any religiously-affiliated organization. Pet. App. 142a.

Petitioners' claim that the program has discriminated in favor of Catholic schools, Pet. 18, which they never pursued in the lower courts, is completely unsupported by the record. There is no record evidence that any student at any nonpublic school other than a Catholic school sought and was denied special education services on the premises of his or her school. Moreover, there is no basis for any suggestion that the JPPSS policy discriminates against students on the basis of religion. As the district court found, Catholic schools in Jefferson Parish enroll non-Catholic students. Pet. App. 194a.

B. The Program Provides Purely Secular Special Education Services.

The district court specifically found that the "JPPSS special education teachers at the nonpublic schools do not teach religion." Pet. App. 134a. The court correctly found that the teaching responsibilities of each JPPSS special education teacher, including teachers located on the premises of nonpublic schools, are "described in the Individualized Education Program (IEP)" of each student, which "describes the child's entire special education curriculum." Pet. App. 133a. The district court further found that:

- "Religious instruction is not described in the IEP";
- "No church or religious officials have any authority whatsoever over the content of the IEP"; and
- "Special education teachers must and do teach only what is outlined in the IEP."

Pet. App. 11a, 133a. As the court of appeals properly concluded:

> The record in this case discloses no evidence whatsoever that any of the special education teachers . . . ever attempted to indoctrinate their students . . . . We will not presume that qualified, conscientious state employees are violating the law.

Pet. App. 35a.

Petitioners do not dispute any of these findings, nor is there any basis in the record to do so.

C. The On-Premises Special Education Services Are Provided In Self-Contained Classrooms By Public School Teachers Under The Supervision And Control Of The JPPSS.

Petitioners' insinuation that the JPPSS teachers providing special education services are anything other than public school employees is frivolous. *See* Pet. at 24-25. The courts below found, and it was undisputed, that all the teachers are JPPSS employees "subject to the same collective bargaining agreement" as their colleagues who

teach on the premises of public schools. Pet. App. 9a, 124a. As the court of appeals carefully noted, unlike the teachers in the Community Education program invalidated in *School District of Grand Rapids v. Ball*, 473 U.S. 373, 377 (1985), none of the JPPSS special education teachers is a "part-time public school employee[]," whose primary employment is teaching regular classes within the nonpublic school. Pet. App. 29a-30a.[3] To the contrary, the district court specifically found that the "special education teachers teach throughout the day in self contained or resource classrooms." Pet. App. 135a. *See also* Pet. App. 11a.[4]

Although Petitioners make much of the fact that special education teacher Mary Cerise previously was employed by a religiously-affiliated school, *see* Pet. at 14, it is of no legal significance. Ms. Cerise testified without contradiction that she identifies herself to her students as being employed by the Jefferson Parish Public School System. Pet. App. 138a, 12a. *See also* Pet. App. 136a (district court finding that "parents of the special education students are informed that the special education teachers are employed by the Jefferson Parish School Board at the yearly IEP meeting."). Her situation therefore is precisely analogous to that of some of the Shared Time program teachers in *Ball*, 473 U.S. at 376, whose similar employment history did *not* render that on-premises program unconstitutional. *See Agostini*, 521 U.S. at [2016]

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[3] As the courts below noted, the only other tasks performed by JPPSS teachers on the premises of nonpublic schools are non-teaching custodial duties such as lunch or bus duty and attendance at no more than one one-hour faculty meeting per month. Pet. App. 12a, 134a.

[4] The district court further found that the "special education classrooms within the nonpublic schools are used only for special education instruction." Pet. App. 134a.

(overruling that portion of *Ball* which invalidated the Shared Time program).

Petitioners' "joint employment" argument also rests on a distorted characterization of the supervisory process. Respondent's contract with the JPPSS expressly provides that "teacher evaluation in the nonpublic schools falls under the auspices of the [JPPSS]" and that accordingly the nonpublic schools must follow all policies and procedures of the JPPSS governing teacher evaluation. Pet. App. 12a, 134a-135a. *See also* Doc. 255 Turner 4/6/90 Test. 42, 59, 63, 68. Although the nonpublic school principal participates in the evaluation process by performing a "limited evaluation" of a teacher's teaching abilities and classroom management skills and filling out some forms, the "principal's supervisory role is strictly circumscribed by JPPSS." Pet. App. 12a. "There is no evidence demonstrating that the principals have supervisory authority over the content of the program." *Id.* *See also* Pet. App. 133a. To the contrary, Ms. Cerise testified without contradiction that "everything she does is written down clearly on the IEP and 'sent to an IEP specialist' and thereafter returned to her" with comments by the JPPSS IEP specialist. Pet. App. 138a-139a.

CONCLUSION

For all these reasons and for the reasons set forth in the brief of respondents Guy Mitchell, *et al.*, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Thomas A. Rayer
Counsel of Record
Richard Bordelon
DENECHAUD & DENECHAUD
210 Baronne Street, Suite 1207
New Orleans, Louisiana 70112
(504) 522-4756

Attorneys for Respondent
Special Education
Services Corporation

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